Kelly, James P., J.C.D., "Separation and Civil Divorce,"
THE JURIST, vol. VI, No.2, April 1946: 187-238

THE JURIST

Volume VI APRIL, 1946 No. 2

SEPARATION AND CIVIL DIVORCE *

I. Separation

MODERN ATTITUDE AND ITS CONSEQUENCES

THE modern attitude toward marriage and its consequent obligations is well summed up, I think, in the title of a recent novel and movie—"Marriage is a Private Affair." This attitude would seem to be but a particular application of the modern philosophy of subjectivism and individualism which masquerades as liberalism. Imbued with this notion, modern worldings are convinced that they alone are concerned in the marriage contract, and that their own happiness and convenience alone are to be considered. With such people all sense of obligation to God or to the commonweal seems to have disappeared. Since marriage is regarded as a private affair, so, also, is the separation of the married couple regarded as their own private affair. I dare say there is hardly a modern husband or wife, experiencing difficulty in married life, who feels that any one in authority, has the right to determine whether or not he or she shall continue cohabitation with his or her spouse.

* Lecture delivered by Rev. James P. Kelly, J.C.D., a Judge of the Archdiocesan Tribunal of New York, before the Annual Meeting of The Canon Law Society of America, at Hotel Pennsylvania, New York City, November 11, 1945.

This, of course, is entirely contrary to the traditional concept of Christian Marriage. In Christian Marriage not only the parties are concerned, but God, the Author of Marriage, and the community, which is built on marriage, have a part, and each is concerned in the separation of a married couple. But even from a purely practical viewpoint this modern attitude does incalculable harm, because, in the first place, the consorts themselves, especially when they are experiencing difficulties, are the poorest judges of the justice of their own cause; in the second place, once separation has taken place, with the bitterness which invariably accompanies it, reconciliation becomes more difficult; thirdly, separation is but a stepping stone to civil divorce and attempted remarriage, for a spouse, free of the obligations imposed by marriage and the home, and bitter against his consort, usually seeks the companionship of others of the opposite sex, which soon leads him into further marital entanglements.

One would indeed be the proverbial ostrich if one did not admit that many—indeed too many—Catholics are infected with the virus of this modern disease. But we would not be true to ourselves if we did not admit also that we priests are in some measure responsible for the spread of this evil among our Catholic people, for too frequently, I fear, we have been loath to interfere in the thankless job of refereeing a family squabble, or seeking to effect a reconciliation. Sometimes, I fear, we have even been swayed by sentiment toward one of the parties, or on occasion, perhaps, have even given the impression to married people that their lives are their own business and that they can separate on their own authority for only trivial reasons if they so wish. I have even heard married people say that priests have told them that it was permissible for them to separate on their own authority provided they did not seek a civil divorce, or, what is worse, that it was permissible to seek a civil divorce on their own authority provided they did not attempt to remarry. This is a far cry from the doctrinal and juridical position of the Church.

POSITION OF THE CHURCH

The doctrinal position of the Church is based on Divine Revelation as well as on the natural law. The Church teaches that marriage is a contract by which a man and a woman give to and accept from each other the perpetual and exclusive right to acts fitted for the generation of offspring.[1] This contract of marriage is not a human invention but is of Divine origin.[2] It was instituted by God at the beginning of time, and has always been regarded as a "res sacra," even when both contractants were unbaptized.[3] This contract is an instrument which is "sui generis"—it is different from every other contract entered by man.[4] The contract itself was raised to the dignity of a Sacrament of the New Law by Our Divine Lord when both contractants are baptized, and, by virtue of its sacramental character, the contract is absolutely indissoluble once it has been validly entered and consummated.[5]

There can be no doubt that it was God's purpose in instituting marriage, to provide a sound method of propagating the human race, not only for this life but for eternal life in Heaven. The Church, therefore, maintains that the primary end of marriage is the procreation and education of children, and that the secondary end of marriage is the mutual aid each of the spouses can give to the other, while, at the same time, providing for each other a remedy for concupiscense.[6] Now the normal and natural means of attaining these ends is cohabitation under the same roof, and, conditions in the world being what they are, this can almost be called essential, at least for the proper education of the offspring. However, be-

[1] Canon 1081.

[2] Pius XI, encycl. "*Casti connubii*", 31 dec. 1930—*A.A.S.*, XXII (1930), 539-592; Leo XIII, encycl. "*Arcanum*", 10 feb. 1880—*A.S.S.*, XII (1880) 385-402.

[3] *Loc. cit.*

[4] *Loc. cit.*

[5] *Loc. cit.* and Canons 1012 and 1118.

[6] Canon 1013.

cause there are occasions when non-cohabitation is justifiable, cohabitation and common life are not regarded as of the essence of marriage, but only as pertaining to its integrity.[7] Nevertheless, both parties are bound in justice, as a consequence of the contract, to live a common life under the same roof unless a just cause excuses, and each has a strict right in justice to demand this.[8]

Therefore the Church, in *The Code of Canon Law,* lays down the grave obligation on married people to live a common life, declaring:

> " Conjuges servare debent vitae conjugalis communionem, nisi justa causa eos excuset." [9]

This obligation embraces more than mere cohabitation under the same roof, for the " communion of conjugal life " means the mutual sharing in each other's whole life and possessions, for only on such a basis can a stable home and a happy family life be founded.[10]

COMPETENCE OF THE CHURCH AND STATE

The law states " nisi justa causa eos excuset," but who is to determine whether or not a cause is present excusing the parties from this obligation, and whether or not this cause is a just cause? There are only two perfect societies in the world with innate power from God to pass judgment on the actions of men—the Church and the State.[11] Hence it belongs to one of these to determine this question. In general the Church is innately and exclusively competent by its divine institution to deal with all " res spirituales " and things connected with

[7] Gasparri, *De Matrimonio* (2 vols., Typis Polyglottis Vaticanis, 1932), II, n. 776; Cappello, *De Sacramentis,* III (Taurinorum Augustae, 1923), n. 823.

[8] Gasparri, *op. cit.* II, n. 1102.

[9] Canon 1128.

[10] Pius XI, encycl. *" Casti connubii "*, 31 dec. 1930—*A.A.S.,* XXII (1930), 539-592.

[11] Leo XIII, encycl. *" Immortale Dei "*, 1 nov. 1885—*A.S.S.,* XVIII (1886), 161-180.

the spiritual realm, whereas the State is exclusively competent to deal with all temporal matters.[12] Therefore it has always been the teaching of the Church that, when both parties to the contract of marriage are baptized (or even when only one is baptized) the Church, has *sole* and *exclusive* competence to grant either a permanent or temporary separation *a mensa et toro manente vinculo.*[13] If both parties to the marriage are unbaptized, it is generally admitted that, because no other authority is available, the State is competent to grant separations *a mensa et toro manente vinculo,* provided the State does nothing contrary to the prescriptions of the Divine Law, as interpreted by the Church.[14]

The law of the Church with regard to marriage competence is found in Canons 1016, 1960 and 1961. These Canons read as follows:

Canon 1016: "Baptizatorum matrimonium regitur iure non solum divino, sed etiam canonico, salva competentia civilis potestatis circa mere civiles eiusdem matrimonii effectus."

Canon 1960: "Causae matrimoniales inter baptizatos iure proprio et exclusivo ad iudicem ecclesiasticum spectant."

Canon 1961: "Causae de effectibus matrimonii mere civilibus, si principaliter agantur, pertinent ad civilem magistratum ad normam can. 1016; sed si incidenter et accessorie, possunt etiam a iudice ecclesiastico ex propria potestate cognosci ac definiri."

The merely civil effects of the bond of marriage are only those effects of the temporal order which are extrinsic to the bond and separable from it, such as rights of heredity or succession, and financial matters in general.[15] But it is evident

[12] *Loc. cit.*

[13] Canon 1960; Conc. Trident., sess. XXIV, *de matrimonio,* can. 5, 12.

[14] Wernz, *Ius Decretalium,* IV (2. ed., Prati, 1912) n. 750, II.

[15] Cappello, *De Sacramentis,* III, n. 71; Wernz-Vidal, *Ius Canonicum,* V (Romae: apud Aedes Universitatis Gregorianae, 1925), n. 687.

that the obligation to live a common conjugal life flows directly from the bond of marriage and pertains to the integrity of the bond. Therefore, the determination of questions relative to this obligation cannot be included under what are called the merely civil effects of the bond, with which, according to Canon 1961, the State is competent to deal when these merely civil effects are the principal object of dispute. Now it is true that financial matters are almost invariably involved in questions of separation *a mensa et toro manente vinculo,* but it must be remembered that in this matter the financial aspect is only an incidental albeit, an important issue. The principal and primary issue, however, is the moral question, viz.: is there a just cause present to excuse these parties from the grave obligation, flowing from the bond of marriage which exists between them, to live a common conjugal life? It is on this principal issue that the Church has *sole* and *exclusive* jurisdiction to pass judgment when at least one of the parties to the marriage is baptized. Therefore, only after the Church has passed judgment on this principal issue and declared that a just cause is present for separation *a mensa et toro manente vinculo,* can the State be said to have any jurisdiction with regard to the incidental question of support and financial settlement. In this country, with our policy of complete separation of the Church and State, it would indeed be idle for the ecclesiastical judge to attempt to settle financial matters involved in the separation of consorts, although, according to Canon 1961, it is within his power to do so. But, being realistic, we must admit that in this country such ecclesiastical settlements would be utterly unenforceable, and therefore it would seem more prudent for an ecclesiastical judge to abstain from making an unenforceable decision. But the *sole* and *exclusive* competence of the Church to pass judgment on the moral question of whether or not a just cause is present to excuse the consorts from living a common conjugal life is enforceable at least in so far as Catholics are concerned even in this country. Therefore, we ecclesiastics would be guilty of grave dereliction in duty if we failed to put into effect this

juridical safeguard to the stability of the home and the protection of the family.

LAW OF THE CHURCH

PARTICULAR LEGISLATION FOR THE UNITED STATES

It is interesting to note that, in addition to the universal legislation of the Church on this matter, we have particular legislation on this very point for the United States of America which adds emphasis to the juridical position of the Church. The Third Plenary Council of Baltimore, in its decrees on the Sacrament of Matrimony, declared:

> " Iis omnibus qui matrimonio conjuncti sunt, praecipimus, ne inconsulta auctoritate ecclesiastica, tribunalia civilia adeant ad obtinendam separationem a toro et mensa. Quod si quis attentaverit, sciat se gravem reatum incurrere, et pro Episcopi judicio puniendum esse." [16]

Viewing the situation as its exists in this country today, and seeing Catholics, infected with the modern disease of private authority, taking it upon themselves to separate from their consorts for any and every reason, and approaching the civil authority seeking to be " legally " separated by decree of the civil courts, it becomes more and more evident that it is our duty to enforce the law of the Code and of the American Plenary Council and to reassert emphatically the *sole* and *exclusive* competence of the Church to pass judgment on the question of the separation of baptized persons, at least with respect to Catholic consorts. As we shall see later, this would also seem to be the key to the control of the whole civil divorce evil among Catholics.

LAW OF THE CODE ON THE SEPARATION OF CONSORTS

(Separatio a mensa et toro manente vinculo)

Although the law makes no mention of it when treating of separation, all agree that the parties themselves may licitly

[16] *Acta et Decreta Concilii Plenarii Baltimorensis Tertii, A.D. MDCCCLXXXIV* (Baltimorae: John Murphy 1886) n. 126.

separate by mutual consent in the following cases, provided there is no proximate danger of incontinence:

(1) The parties may separate *permanently* by mutual consent if either wishes to enter religious life or the husband wishes to receive Holy Orders;

(2) They may separate *temporarily* by mutual consent for any supernatural motive (e. g., to do penance or to attain greater spiritual perfection), or even for a natural reason which is serious and morally good (e. g., in order that one may take up certain studies or obtain a more lucrative position, etc.).

We will pass over the conditions set down for such separations and the question of their advisability, for these points are not *ad rem.* However, in these cases both parties always retain the right to demand the resumption of common life and, if this demand is made, the other party is obliged to resume cohabitation unless he has undertaken a state of life incompatible with the married state.[17]

In all other cases it is not the right of the parties to separate either permanently or temporarily by mutual consent or on their own authority, except (and this is definitely by way of exception) when the crime of one party is certain and there is danger to the other party in delaying until the matter is presented to the proper authority.[18]

The law of the Church with regard to the " just cause " excusing baptized consorts from the obligation of living a common conjugal life is quite severe. But this is as it should be when we consider, that those who have entered the married state are, by divine decree, " no longer two but one flesh;" [19] and that they have entered this indissoluble contract to become the partners of God in the creation of new beings who

[17] Cappello, *De Sacramentis*, III, n. 825; Noldin, *Summa Theologiae Moralis* (3 vols., Oeniponte, 1921), III, nn. 668-669; Lehmkuhl, *Theologia Moralis* (2 vols., Friburgi-Brisgoviae, 1893), II, n. 710; Genicot-Salsmans, *Institutiones Theologiae Moralis* (10. ed., 2 vols., Bruxellis: Alb. Dewit, 1922), II, n. 556.

[18] Canons 1129-1131 *et infra.*

[19] St. Matthew, XIX, 6.

will live forever; and that it is their sacred trust and glorious privilege to train and rear their offspring to become citizens of Heaven.[20]

According to the law of the Church there are two kinds of separations *a mensa et toro manente vinculo*—permanent and temporary.

A. Permanent Separations

In view of the exalted dignity of Christian Marriage, it is easily understood why the law of the Church considers only one reason as a "just cause" for the *permanent* separation of the followers of Christ, and surrounds even this sole cause with certain qualifications. The law of the Church on permanent separation is set forth in Canon 1129.

Canon 1129, § 1, states:

> § 1. "Propter coniugis adulterium, alter coniux, manente vinculo, ius habet solvendi, etiam in perpetuum, vitae communionem, nisi in crimen consenserit, aut eidem causam dederit, vel illud expresse aut tacite condonaverit, vel ipse quoque idem crimen commiserit."

Paragraph two of the same Canon explains what is meant by tacit condonation of the crime and gives the juridical norm for judging whether or not the crime has been tacitly condoned. This section of Canon 1129, states:

> § 2. "Tacita condonatio habetur, si coniux innocens, postquam de crimine adulterii certior factus est, cum altero coniuge sponte, maritali affectu, conversatus fuerit; praesumitur vero, nisi sex intra menses coniugem adulterum expulerit vel dereliquerit, aut legitimam accusationem fecerit."

Before a permanent separation can be granted, therefore, the following conditions must be verified:[21]

[20] Pius XI, encycl. "*Casti connubii*", 31 dec. 1930—*A.A.S.*, XXII (1930), 539-592; Leo XIII, encycl. "*Arcanum*", 10 feb. 1880—*A.S.S.*, XII (1880), 385-402.

[21] Cappello, *De Sacramentis*, III, n. 826; Genicot-Salsmans, *Institutiones Theologiae Moralis*, II, n. 556; Noldin, *Summa Theologiae Moralis*, III, n. 670;

1. The adultery must be morally certain for, in doubt, no one is to be deprived of his right. However, proof of adultery by the very nature of the crime is difficult. Therefore, in most cases moral certitude must usually be derived from circumstances, conjectures and even rumors.[22]

2. The adulterous copulation must be complete and consummated. Incomplete or preparatory actions, in themselves, do not give rise to the right to separate, but these may be taken as indications of the existence of the greater crime if the circumstances so warrant.[23]

3. The adultery must be formal and not merely material, i. e., the adulterous consort must know that the other party is not his spouse and freely and willingly consent to the sin. But it is not necessary that the accomplice in the sin know that the person with whom he is sinning is married.

4. The adultery must not be approved by the innocent spouse, either explicitly by consenting to it, or even implicitly by his failure to prevent it when he knew it was about to be committed and it was within his power to prevent it.

5. The adultery must not be directly or indirectly provoked by the innocent spouse, thereby giving cause for the crime. It is disputed among authors whether or not the innocent spouse has given cause for the adultery when the crime is only indirectly provoked, e. g., by the frequent denial of the debitum which, it is foreseen, will lead to adultery.[24] Since here there is question of loss of right, the law must be strictly interpreted, and therefore it would seem that frequent denial of the debitum, which, it is foreseen, will lead to adultery, if it can be proved,

Lehmkuhl, *Theologia Moralis*, II, n. 712; Gasparri, *De Matrimonio*, (ed. 1932), II, n. 1173; Wernz-Vidal, *Ius Canonicum*, V, n. 639, note 112.

[22] *S. Rom. Rotae Dec.*, Vol. XXI (1929), Dec. I, nn. 5-14; Gury-Ballerini, *Compendium Theologiae Moralis*, (11 ed., 2 vols., Romae, 1892), II n. 761, note A; Schmalzgrueber, *Ius Ecclesiasticum Universum*, Lib. IV, (ed. 1844), Tit. XIX, n. 116-117; St. Alphonsus, *Theologia Moralis*, (10 vols., Mechliniae, 1852), Lib. VI, n. 961.

[23] *Loc. cit.*

[24] Cappello, *De Sacramentis*, III, n. 826; Payen, *De Matrimonio in Missionibus* (3 vols., Zi-ka-wei, 1928), III, n. 2469; Wernz-Vidal, *Ius Canonicum*, Vol. V (Romae, 1925), n. 639, note 112.

must be regarded as provocation to adultery, and the separation denied.[25]

6. The adultery must not be expressly or tacitly condoned by the innocent party after he has attained certain knowledge of the crime. The six-month period mentioned in Canon 1129, § 2, of course, is to be computed from the day the innocent spouse learned of the crime with certainty, and not from the day of the commission of the crime.

7. The adultery must not be compensated by the other spouse committing the same crime, at least prior to the granting of the separation. If the innocent spouse falls into the sin of adultery, after the separation has been decreed, it is disputed whether or not the originally guilty party is obliged to return.[26] Therefore the obligation cannot be imposed upon him.

It must be noted that the innocent consort may, but *per se*, is not *obliged* to separate from his adulterous spouse.[27] The innocent spouse likewise is never *obliged* to resume cohabitation with the adulterous spouse if a permanent separation has been granted.[28] However, he may request and resume cohabitation with the adulterous spouse if he so wishes, provided the penitent adulterer has not entered a state of life incompatible with the married state.[29] If the innocent consort justly demands the resumption of cohabitation, the guilty party is obliged to return.[30]

Most authors consider the crime of sodomy with a third person, and the crime of bestiality, as equivalent to adultery,

[25] Canon 19.

[26] Schmalzgrueber, *Ius Canonicum Universum*, Lib. IV tit. XIX, n. 107; St. Alphonsus, *Theologia Moralis*, Lib. VI, n. 967; Gasparri, *De Matrimonio*, (ed. 1932), II, n. 1173; Lehmkuhl, *Theologia Moralis*, II, n. 710; Ballerini-Palmieri, *Opus Theologicum Morale*, (3 ed., 7 vol., Prati, 1898-1901) VI, n. 501.

[27] Canon 1129 § 1; cf. also Gasparri, *op. cit.*, n. 1174; Ballerini-Palmieri, *op. cit.* VI, n. 495; Genicot-Salsmans, *Institutiones Theologiae Moralis*, II, n. 556.

[28] Canon 1130.

[29] *Loc. cit.*

[30] Gasparri, *op. cit.*, n. 1174; Noldin, *Summa Theologiae Moralis*, III, n. 670; Ballerini-Palmieri, *op. cit.*, VI, n. 499.

and, under the conditions mentioned above, as constituting sufficient cause for a permanent separation even though these are not mentioned in the law.[31]

B. Temporary Separations

Temporary separations may be granted either for a definite time or for an indefinite period and for a variety of causes. However, in all temporary separations the parties are obliged to resume cohabitation whenever the cause ceases, on account of which the separation was granted. If, however, the separation was granted for a definite period the innocent party is not obliged to return until the time set by the decree of separation has elapsed, unless the Ordinary by a new decree orders his return. If the separation was granted for an indefinite period the guilty party must prove that the cause of the separation no longer exists, and a new decree should be issued ordering the parties to resume cohabitation. The law of the Church on this matter is contained in Canon 1131. The Canon reads:

> "§ 1. Si alter coniux sectae acatholicae nomen dederit; si prolem acatholice educaverit; si vitam criminosam et ignominiosam ducat; si grave seu animae seu corporis periculum alteri facessat; si saevitiis vitam communem nimis difficilem reddat, haec aliaque id genus, sunt pro altero coniuge totidem legitimae causae discedendi, auctoritate Ordinarii loci, et etiam propria auctoritate, si de eis certo constet, et periculum sit in mora."
>
> "2. In omnibus his casibus, causa separationis cessante, vitae consuetudo restauranda est; sed si separatio ab Ordinario pronuntiata fuerit ad certum incertumve tempus, coniux innocens ad id non obligatur, nisi ex decreto Ordinarii vel exacto tempore."

It is evident that this Canon does not give a taxative enumeration of the causes on account of which a temporary sepa-

[31] *S. Rom. Rotae Dec.*, Vol. XXI (1929), Dec. LXIII, n. 3; St. Alphonsus, *Theologia Moralis*, Lib. VI, n. 960; Lehmkuhl, *Theologia Moralis*, II, n. 712; Ballerini-Palmieri, *op. cit.*, VI, n. 491; Payen, *De Matrimonio*, III, n. 2464; Aertnys, *Theologia Moralis*, 2 vols., II, n. 931; Doheny, *Canonical Procedure in Matrimonial Cases*, II, (Informal) (Milwaukee: Bruce, 1944) p. 630.

ration may be granted, but merely gives the principle reasons for such a separation. It is left, therefore, to the discretion of the judge to decide whether or not the reason, on account of which the temporary separation is sought, is a " just cause " and proportionate to the sacred character of Christian Marriage and its mutual obligations.

The cases of temporary separation adjudicated by the Sacred Roman Rota would seem to be the best and most authentic guide to the mind of the Church with regard to the question of what constitutes a " just cause " for temporary separation. A perusal of these cases, I think, will leave one with the impression that the Church is most severe in this matter and very reluctant to grant even a temporary separation to Catholic consorts. The reason for this attitude is given in one decision, which reads in part as follows:

> " It has been the constant jurisprudence of this Sacred Tribunal and of the Sacred Congregation of the Council that great caution should be used in granting separations from bed and board, because separation is directly opposed to the very purpose and ends of marriage; it gives rise to scandal; it destroys the family; it exposes the consorts to the danger of incontinence; and it inflicts a severe loss on children, if there are any. The Most Reverend Auditors of this Tribunal are convinced therefore that they must adhere even more rigidly to this very wise jurisprudence of the Holy See, now when modern customs are tending to scuttle with facility all conjugal rights, either 'per divortium plenum sive per divortium semiplenum.' There is no one who does not know that if 'divortium semiplenum' is easily granted, the way is made easy for 'divortium plenum.' For matrimony exists also as a remedy for concupiscence and, if common life is dissolved by separation, immediately it opens the door to adulterous amours and illicit associations." [32]

This decision, written by the eminent Cardinal Lega, goes on to reprove some of the modern theologians (mentioning by name Gennari, Lehmkuhl, Gury and Scavini) who " seem to

[32] *S. Rom. Rotae Dec.*, Vol. II (1910), Dec. XXIV, n. 11.

have departed somewhat from the rigor of this older jurisprudence," and the decision continues to show how necessary it is now more than ever to adhere to the jurisprudence of the Holy See in view of the definite breakdown in morals and change in customs in these times.[33] Although this decision was written thirty-five years ago, the Rota, even in more recent cases, does not seem to have departed from this norm.

In a case decided in 1928 an elderly couple were refused a *temporary* separation for what might be called "incompatibility of temperament." They had been married for twenty-seven years and had quarrelled frequently and had been unhappy throughout most of that time. The plaintiff claimed that there now existed "implacable hatred" *(odium capitale)* on the part of his wife. Although he proved that his wife had used uncomplimentary and even opprobrious language in speaking to him and about him, the Rota declared that the use of such language did not prove the existence of "odium capitale," but only proved her anger toward him because of his conduct. Their frequent quarrels, the Rota declared, were not due to "odium capitale" but rather to avarice and bad temper, and, therefore, the Rota refused to grant a temporary separation because a "just cause" was not present.[34] This case brings out clearly that frequent quarrels, in themselves, are not regarded by the Holy See as a "just cause" even for temporary separation.

This teaching is confirmed in another case, decided in 1930, when the Rota refused a request for temporary separation because of constant and continuous quarrels. In this case the decision states the same principles as given by the Rota in 1910 and 1928. The decision states:

> "Although cohabitation is not of the essence of marriage yet separation from bed, board and cohabitation, even temporary, is a 'res gravis' inasmuch as it is public, it is contrary to the obligations of marriage, and is fraught with dan-

[33] *S. Rom. Rotae Dec.*, Vol. II (1910) Dec. XXIV, n. 13.

[34] *S. Rom. Rotae Dec.*, Vol. XX (1928), Dec. XXIX.

> gers to the consorts, especially the danger of incontinence. Therefore the cause of separation, that it may be considered as legitimate, must be proportionate to these evils, i. e., it must contain an element of danger either to the soul or body of the other party, and this danger must be so serious that the obligation ceases, which is imposed by the law binding the consorts to observe 'the communion of conjugal life'" (Canon 1128).[35]

It can be regarded as certain, therefore, that quarrels and misunderstandings in themselves, no matter how frequent, are not to be considered as sufficient cause even for the temporary separation of Catholics, unless these quarrels constitute a danger to the spiritual or bodily well-being of the other party or the children. In fact, before the Code, most authors stated that all causes for temporary separation must include this element of danger to the spiritual or bodily welfare of the other party in order to be regarded as sufficient cause for temporary separation,[36] and the Rota seems merely to be following this teaching.

The criterion for judging the serious character of quarrels and for determining whether or not a danger to soul or body is present, is given by the Rota in this same decision, when it states:

> " In estimating the gravity of quarrels and disagreements, the facts must be weighed, and great consideration given to what inspired the quarrels taken in conjunction with the character and condition of each consort. A separation cannot be granted because of only slight difficulties, even though these are of frequent occurrence, which, for example, are due to a grumpy disposition; nor even for graver quarrels, which arise from sudden anger or quick temper, but which ordinarily can be reconciled quickly; nor *a fortiori*, for quarrels which arise from just reproving and correcting; for all of these do not inflict a grave

[35] *S. Rom. Rotae Dec.*, Vol. XXII (1930), Dec. XLVII, n. 2.

[36] Wernz, *Ius Decretalium*, IV, n. 713; Schmalzgrueber, *Ius Canonicum Universum*, Lib. IV, tit. XIX, nn. 141-145; Gasparri, *De Matrimonio*, II (3 ed., 2 vols., Parisiis, 1904) n. 1371; Gury-Ballerini, *Compendium Theologiae Moralis*, II (ed. 1892), n. 761; Lehmkuhl, *Theologia Moralis*, II, n. 710.

offense or cause grave fear in a stable person. But, on the other hand, causes for temporary separation are considered just when it is proved that the disturbances spring from deep-seated malice, or a desire and purpose of inflicting serious harm. In such cases the difficulty of living a common life can be so great that right reason and prudence would decree that it was too much to expect of a normal and steady person. The judge, therefore, not arbitrarily, but weighing the circumstances of persons, place and time, must decide whether or not these constitute a serious danger to the body or soul of the other party."[37]

Other causes for temporary separation, recognized by the Rota in recent cases, are:

1) the mental abnormality of one of the parties;[38]
2) malicious desertion, done with the intention of not returning and without just provocation;[39]
3) the persistent and constant practise of onanism and other irreligious and immoral acts on the part of one of the parties.[40]

From these cases adjudicated in recent years by the Sacred Roman Rota, we are able to obtain a fairly accurate notion of the serious character of the crimes required by the practice of the Holy See before they can be regarded as "just causes" for even the temporary separation of Christian consorts. The severity of this discipline stands out, when contrasted with the reasons on account of which many Catholics of our day seek to separate from their spouses. The severity of this discipline also stands out when contrasted with some of the standards given as sufficient reasons for temporary separation by some modern moral theologians and canonists. It would seem, especially in these days when Christian marriage, the home, and the family, are being undermined on every side, that the traditional discipline and standards set by the Holy See are to be upheld at all costs, and preferred to other more lax standards, no matter by whom they are offered.

[37] *S. Rom. Rotae Dec.*, Vol. XXII (1930), Dec. XLVII, n. 4.

[38] *S. Rom. Rotae Dec.*, Vol. IV (1912), Dec. XVI.

[39] *S. Rom. Rotae Dec.*, Vol. V (1913), Dec. XIX.

[40] *S. Rom. Rotae Dec.*, Vol. XVII (1925), Dec. VI.

C. Separation by Private Authority

A casual reading of the Canons of the Code on Separation will convince one that they are not too well written. Canon 1131 states that one may separate *temporarily* on his own authority, provided the crime of the other party is certain and there is danger in delay. Canon 1129, however, in dealing with *permanent* separation, makes no mention whatsoever of the right to separate permanently on one's own authority, but the very next Canon (1130), in dealing with the question of resumption of common life after a permanent separation has been granted, uses the phrase, "sive sententia iudicis sive propria auctoritate." This of course implies that one may separate even *permanently* on his own authority, but it does not limit this right by the conditions regarding the certainty of the crime and the danger in delay with which the law restricts the right to separate *temporarily* on one's own authority. Because of this omission, however, it would not seem to be correct to deduce that one may separate *permanently* on his own authority even though the crime was not certain or there was no danger in delay. The following reasons would seem to rule out such an interpretation:

1) The phrase "propria auctoritate" is used in Canon 1130 only in passing and parenthetically, while the principal subject of the Canon is the question of the resumption of common life after a permanent separation has been granted;

2) The conditions regarding the certainty of the crime and the danger in delay are prescribed for the lesser evil of *temporary* separation, and, therefore, it would seem, must be understood to apply also to the greater evil of *permanent* separation, which is much more serious;

3) Before the Code, one could separate permanently on his own authority only when the adultery of the other party was not only certain but notorious. Although, before the Code, there seemed to be no mention of the other condition regarding danger in delay in the case of permanent separation, yet a permanent separation on the private authority of a consort seems to have been regarded as only a "provisional" separation

which could not claim juridical effect until after it was confirmed by ecclesiastical decree.[41]

Therefore it seems certain that a Christian spouse cannot separate either permanently or temporarily on his own authority unless the crime of his consort is certain and there is danger in delay.

Another difficulty arises from the wording of the Canons on this matter, when one who has separated on his own private authority seeks to obtain the juridical effects of a legitimate separation (e. g. a woman seeks to acquire her own proper domicile). It would seem that such effects cannot be attributed to separation by the private authority of the parties unless an ecclesiastical judge examines the circumstances surrounding the separation, and issues a decree that the separation by the private authority of the parties was legitimate at the time it took place. As noted above, this would seem to have been the practice also before the Code,[42] and, therefore, in accordance with Canon 6, this should be regarded as the proper interpretation of the law of the Code.[42a] If this were not so, great confusion would result, and it would be impossible to determine whether or when the juridical effects of a legitimate separation were operative.

PROCEDURE FOR SEPARATION CASES

The Code of Canon Law has no prescription with regard to the procedure to be followed in cases of either permanent or temporary separation. Canon 1130, in speaking of *permanent* separation, uses the term "sententia iudicis," and Canon 1131, in speaking of *temporary* separation, uses the term "auctoritate Ordinarii loci." From the use of these terms it might

[41] Wernz, *Ius Decretalium*, IV, n. 711-714; Gasparri, *De Matrimonio*, (ed. 1904), II, n. 1371; Lehmkuhl, *Theologia Moralis*, II, n. 710; Sanchez, *De Matrimonio*, Lib. X, Disp. XII, n. 42; Ballerini-Palmieri, *Opus Theologicum Morale*, VI, n. 494.

[42] Wernz, *op. cit.*, IV, n. 714; Lehmkuhl, *Theologia Moralis*, II, n. 710.

[42a] Cf. Torre, *Instructio a Tribunalibus Dioecesanis in pertractandis causis de nullitate matrimoniorum*, (Neapoli: M. D'Auria, 1936), art. 6, p. 12.

appear that for *permanent* separation the judicial process must be used, and for *temporary* separation the administrative process. However, this conclusion does not seem to be correct. More correctly it would seem that both permanent and temporary separations may be granted by either the judicial or administrative process. The Commission for Interpreting the Canons of the Code in 1932 was asked "*Whether the temporary separation of husband and wife for the causes mentioned in Canon 1131 § 1, should be administratively decreed?*" The Commission replied, "*In the affirmative, unless the Ordinary determines otherwise ex officio, or at the instance of the parties.*" [43] From this decision of the Commission it is clear that even temporary separations may be granted either administratively or judicially. The Sacred Roman Rota in 1925, in an incidental question, came to the same conclusion, reasoning that "the authority of the Ordinary" mentioned in Canon 1131 included judicial authority as well as administrative.[44] It would seem that a *permanent* separation may also be granted after proceeding either administratively or judicially, but, for two reasons, it would seem more fitting that a permanent separation should be granted only by a judicial decree. In the first place, the permanent severance of conjugal cohabitation is a tremendously important matter and has far-reaching effects upon the lives of the consorts, of the children, and of the community, and the judicial process, by its nature, is more suited to the making of such important decisions and offers more safeguards against error and hasty judgment. Secondly, this is done procedurally in the civil law only by judicial decree, and the Church can hardly be less careful in this matter than is the civil law. It would appear, from the decision of the Code Commission mentioned above, that the decision as to which process is to be used rests entirely with the Ordinary, although the parties

[43] Pont. Comm. for Interpreting Canons of the Code, 25 iun. 1932—*A.A.S.*, XXIV (1932), 284.

[44] *S. Rom. Rotae Dec.*, Vol. XVII (1925), Dec. VI, n. 2; cf. also Canon 1572, § 1.

have a right to request the judicial process for either permanent or temporary separation, if they so wish.

A. Judicial Process

When it has been decided that the matter is to be heard judicially, the Officialis, having ordinary judicial jurisdiction, is empowered by his office to hear such cases without further delegation, unless the Bishop has expressly reserved to himself cases of separation.[45] But the Vicar General, since he has no judicial power, is not authorized by virtue of his office to decide such cases judicially.[46] Since the bond of marriage is not in jeopardy, it would seem that one judge would be sufficient to constitute the Tribunal.[47] However, in accordance with the practice of the Sacred Roman Rota, it would seem well for the Ordinary to submit such cases, especially requests for permanent separation, to a Tribunal of at least three judges.[48] Since the bond of marriage is not in jeopardy, it is not necessary that the Defender of the Marriage Bond be cited to take part in this trial.[49] However, since the public good is involved, it would seem to be necessary to invoke the offices of the Promoter of Justice, who would oppose the granting of the separation in behalf of the common good.[50] The competence of the Tribunal trying a case judicially would be determined according to the prescriptions of Canon 1964. In the judicial process it would seem necessary that a libellus be submitted by the plaintiff, that the joining of the issue take place, and that the doubt be formulated, and that the *pars conventa* be sent a formal citation. It would also seem to be necessary to cite the Promoter of Justice for the various sessions of the Tribunal

[45] Cf. Canon 1573.

[46] S. Cong. de Sac. Instr. "*Provida*", 15 aug. 1936, Art. 3, § 2.—*A.A.S.*, XXVIII (1936), 314.

[47] Cf. Canon 1576, § 1, 1°.

[48] *S. Rom. Rotae Dec.*, Vol. XXI (1929), Dec. I; Vol. V (1913), Dec. XIX.

[49] Cf. Canons 1586 and 1967.

[50] Cf. Canon 1586.

and give him the opportunity of being present at the questioning of the parties and witnesses, if he so wishes.[51] It would also seem necessary to inform him of all the other steps in the process.[52] The testimony of the witnesses would necessarily have to be taken before the judge, or a duly delegated auditor, and a notary.[53] A decree of publication should be issued and the parties given the opportunity of reading the testimony and making a defense. A decree of conclusion should then be issued and a sentence drawn up, giving the reasons in law and in fact for the decision of the Court.[54] An appeal against the sentence of the Court of First Instance might be taken by the party who feels aggrieved, or by the Promoter of Justice. However, this appeal is *not* mandatory, and the sentence of the Court of First Instance may stand as final.[55] If an appeal is taken, it should be lodged with the ordinary Tribunal of Second Instance or with the Sacred Roman Rota.[56] The Commission for Interpreting the Canons of the Code, in 1932, was asked: "*Whether in cases regarding the separation of husband or wife, mentioned in Canon 1131, § 1, the same form is to be observed in Second Instance as in First Instance?*" The Commission answered this question: "*In the affirmative.*"[57] Therefore, if the trial was conducted judicially in First Instance it must be conducted judicially in Second Instance. The Code Commission has also recently decided that cases of conjugal separation are not to be considered as "res iudicata," even after a decree of the Ordinary or ecclesiastical judge has been issued, but rather, in accordance

[51] Cf. Canon 1587.

[52] *Loc. cit.*

[53] Cf. Canon 1773.

[54] Cf. Doheny, *Canonical Procedure in Matrimonial Cases,* II (Informal), 646-648.

[55] Cf. Canon 1986.

[56] Cf. Canons 1594 and 1599.

[57] Pont. Comm. for Interpreting Canons of the Code, 25 iun. 1932—*A.A.S.,* XXIV (1932), 284.

with the prescriptions of Canon 1903, such cases are to be classified among those things which never become "res iudicata." [58]

B. Administrative Process

If the Ordinary decides that the matter of the separation of the parties is to be conducted administratively, his competence would not be determined according to Canon 1964, but according to Canon 201. Therefore, the competent Ordinary would not be the Ordinary of the place where the marriage took place, or, necessarily, the Ordinary of the place where the respondent has his domicile, but rather the Ordinary of the place where either of the parties has a domicile, or quasi-domicile, or the Ordinary of the place where either party is actually staying, who would adjudicate the matter administratively. In this regard, however, it must be remembered that a wife, not yet legitimately separated, necessarily maintains the domicile of her husband, although she may acquire her own quasi-domicile.[59] The Officialis would have no power by virtue of his office to handle a case of separation administratively, for he enjoys only judicial jurisdiction.[60] The Vicar General, however, would have such power in the administrative process by virtue of his office.[61] Either the Bishop or the Vicar General could delegate any other priest to conduct this process.[62] The law prescribes no formalities for the determination of a question of this kind in an administrative manner. However, the natural law would demand that the other party to the marriage be given an opportunity to be heard, and that both parties would have an opportunity to defend themselves after the proofs had been gathered. Likewise, the natural law would demand that the Ordinary, or his delegate, even in the administrative process, obtain the *same*

[58] Pont. Comm. for Interpreting Canons of the Code, 8 apr. 1941—*A.A.S.*, XXXIII (1941), 173.

[59] Cf. Canon 93.

[60] Cf. Canon 1573.

[61] Cf. Canons 196-198.

[62] Cf. Canon 199, § 1.

moral certitude with regard to the *existence* and the *justice* of the alleged cause for separation before he can issue any decree of separation, be it permanent or temporary.[63] The party who feels aggrieved by the administrative decree of the Ordinary may take recourse against this administrative decree to the Sacred Congregation of the Sacraments.

CARE OF CHILDREN OF SEPARATED PARENTS

Canon 1132 prescribes that the care of the children of separated parents must be settled by the Ordinary. The Canon leaves the matter to the good judgment of the Ordinary, warning him only that he must always make the provision which seems best suited to insure their Catholic education and upbringing. Wherever possible, therefore, he should decree that the custody of the children is to be given to the Catholic party if one is a non-Catholic, or to the innocent party if both are Catholics.

OBLIGATIONS OF CATHOLICS BASED ON STATUS

A. Obligation of Catholic Consorts

From what has been said above, it is evident that Catholics may not licitly separate on their own authority (except under the conditions mentioned in the law), and that Catholics may not approach the civil courts for either a permanent or temporary separation *a mensa et toro manente vinculo* at least until after such a separation has been granted by the ecclesiastical authority, and permission has been given to them to approach the civil courts to safeguard the merely civil effects following upon such a separation.[64] Catholics who do so commit a grave sin by acting contrary to the prescriptions of Canons 1128 to 1132, 1960 and 1961, as well as against the direct prohibition of the Third Plenary Council of Baltimore. Such persons, *per se,* are obliged to resume common life with their

[63] Doheny, *Canonical Procedure in Matrimonial Cases,* II (Informal), 643-646.

[64] Noldin, *Summa Theologiae Moralis,* III, n. 672.

consorts or to seek an ecclesiastical separation before they may be absolved from their sins.

B. Obligation of Catholic Lawyers

Juridically the lawyer is the same person as his client. Therefore, if it is lawful for the client to separate on his own authority, or to approach the civil courts for a separation, it is lawful for a Catholic attorney to act in his behalf. But is it ever lawful for a Catholic lawyer to represent a client who is *illicitly* separating from his spouse? This question is answered by invoking the principles regarding cooperation in the sin of another. Applying these principles, a Catholic lawyer may represent a client who is *illicitly* seeking a separation under two conditions:

1. The cooperation of the lawyer must not be formal cooperation in the sin of his client but merely material (i. e., he must not approve the evil intention of his client and must do everything possible to dissuade him from following his evil course—thus rendering his cooperation only material).

2. The Catholic lawyer may give even this material cooperation only when there is a grave reason for doing so, which is proportionate to the evil in which he is cooperating. The magnitude of the evil, in which he is cooperating, must be judged from the effects following upon the separation of consorts. Inasmuch as the evils which flow from separation are not only evils of a private nature (such as placing the consorts in the occasion of sin) but, inasmuch as they are also evils against the public good (such as the destruction of the family and the undermining of society), the reason which would justify a Catholic lawyer in cooperating in the illicit separation of a married couple must be a reason which would be proportionate to these evils. Therefore, this must be a reason of the public or supernatural order, and not merely a reason of a private nature. Therefore the mere fact that the Catholic attorney will lose a client, or that another less scrupulous lawyer will take the case if the Catholic lawyer refuses it, are not sufficient reasons to permit a Catholic attorney to undertake these cases, for such are not reasons of the public order. If all the Catholic

lawyers were threatened with disbarment, or expulsion from the Bar Associations, these would constitute sufficient reasons for undertaking the case of a couple illicitly separating, for the public good would suffer from the disbarment or expulsion from the Bar Associations of all Catholic lawyers. If, by effecting this separation, even though it were done illicitly, the Catholic lawyer would prevent children being brought up as non-Catholics, or by an unworthy parent, this would be a sufficient reason of the supernatural order to permit him to act.[65]

It is evident, therefore, that Catholic lawyers must seek the guidance and direction of their Pastor and Bishop before undertaking cases of this kind, for only thus can they be sure that they are acting with a good conscience.

C. Obligation of Catholic Judges

The case of the Catholic judge of the civil court granting a separation *a mensa et toro manente vinculo* differs from that of the Catholic lawyer seeking such in behalf of a client in one important aspect. The judge is obliged by his office to render sentence in accordance with the statutes of the State regardless of his own personal attitude toward these statutes, and he is obliged to hear those who come before him in accordance with these statutes whether he likes it or not, whereas the lawyer is ordinarily free to undertake the case or not as he chooses. With this difference in mind, the principles regarding cooperation in the sin of another apply. Therefore, if a plaintiff is illicitly seeking a separation from his spouse before the civil court, a Catholic judge may cooperate in the sin of the plaintiff only:

1) If his cooperation in the sin of the plaintiff is not formal but merely material cooperation (i. e., he does not approve the evil action of the plaintiff, and does everything possible to dissuade him from instituting this action);

2) If he has a grave reason of the public order which justifies him in cooperating in this evil action. In the case of the Catholic judge this grave reason of the public order is almost

[65] Gasparri, *De Matrimonio*, (ed. 1932), II, nn. 1310-1311; Genicot-Salsmans, *Institutiones Theologiae Moralis*, II, n. 562.

> always present inasmuch as if he did not act it would be necessary for him to resign his office, and if all Catholic judges were forced to resign, or were unable to accept the public office of magistrate, a grave and public harm would be done to both the Church and the State.[66]

Therefore, it would seem that if the Catholic judge fulfills the first condition, by making sure that his cooperation in the sin of those who are unlawfully seeking a separation from the civil court is merely material cooperation, he may continue to act with a good conscience.

D. Obligation of the Catholic Priest

From all that has been said it is evident that the first obligation of the priest is to uphold the claim of the Church to *sole* and *exclusive* jurisdiction in the granting of separations *a mensa et toro manente vinculo* in the marriage of baptized persons. Therefore, a priest must not dare to grant permission to laymen to separate on their own authority, or to approach the civil court to seek a decree of separation, but rather he must refer all such cases to the Ordinary. His second obligation would seem to be to preach and to make known the position of the Church on this matter, and to urge the faithful followers of Christ to abide by the decisions of the ecclesiastical authorities. Thirdly, the priest to whom is given the care of souls must seek to prevent situations arising within the family circle which would lead to a separation of the consorts, and he must be ever ready to arbitrate disputes and effect reconciliations between them.

II. Civil Divorce

ENORMITY OF THE PRESENT EVIL

In my opinion, the most important public moral problem facing the Church in America today is the breakdown of the family, caused principally by the ease with which a civil di-

[66] Gasparri, *De Matrimonio* (ed. 1932), II, nn. 1310-11; Genicot-Salsmans, *Institutiones Theologiae Moralis*, II, n. 562; Noldin, *Summa Theologiae Moralis*, III, n. 673.

vorce may be obtained. This was one of the principal things selected by our present Holy Father to be deplored in our country when he wrote to the American Hierarchy praising America and American Catholicism on the occasion of the one hundred and fiftieth anniversary of the founding of the Hierarchy. He asked that we work "that this disease, alas so widespread, may be cured by extirpation."[67] This deadly moral cancer is gnawing away the moral fibre of our beloved America, and, I fear, is spreading rapidly even among the faithful. Before the war it was generally accepted that we ranked third in the world in the number of divorces granted in proportion to the marriages entered, giving place only to pagan Japan and atheistic Russia. It was also generally accepted at that time that we would soon surpass both of these nations, inasmuch as the divorce rate in this "Christian" country has been increasing by leaps and bounds every year since 1867, when official data on this subject first became available. The latest available statistics are for the year 1940, and these are based on figures supplied by the Bureau of Census of the Department of Commerce of the United States Government. During the year 1940, according to the Bureau of Census, 264,000 divorces were granted in the United States.[68] These figures indicate that one out of every five marriages entered during recent years is ending in a civil divorce.[69] In 1940, it was estimated also, based on the rapid growth of this malignancy, that, by 1946, one in three or perhaps one out of every two marriages entered would end in the divorce court.[70] It must be noted that this estimate was made before the torrent of hasty, ill-advised marriages, brought about by the war, had descended upon us, so that it would

[67] Pius XII, encycl., "*Sertum laetitiae*", 1 nov. 1939—*A.A.S.*, XXXI (1939), 635-656.

[68] "Vital Statistics—Special Reports", Vol. XV, n. 18, p. 193 (March 20, 1942).

[69] Schmiedeler, "The Wedding Ring" (N. C. W. C. News Release, December 25, 1944, in reply to an article appearing in "Quarterly of School of Law", Duke University—Summer, 1944).

[70] *Loc. cit.*

therefore appear that we have now surpassed—or at least will soon surpass—even these appalling figures.

CIVIL DIVORCES OBTAINED BY CATHOLICS

It is impossible to determine just how many Catholic marriages end in the divorce court, but if half of the marriages in this country end in divorce a goodly percentage of these must, of necessity, be Catholic marriages. Moreover, who of us does not know many Catholics who have already obtained civil divorces, and many more, especially as a result of hasty war marriages, who are about to do so. The best figures I have been able to find, in order to obtain some idea of the number of Catholics who are being affected by the plague of civil divorce, come from a very small suburban parish. The pastor of this parish has informed me that he has about 475 adult Catholics living in his parish, and, of these, more than 100 are now living in adulterous or concubinate unions. There are 96 invalid marriages in this parish. In 26 of these invalid unions, a Catholic has been civilly divorced in a previous marriage. In 29 a Catholic is living with a divorced non-Catholic after only a civil ceremony or a ceremony before a non-Catholic minister. This means that in 55 out of 96 invalid unions the reason for the nullity is directly traceable to the evil of civil divorce. If anything approaching this proportion exists in other parishes throughout the country, then the divorce evil has already made tremendous inroads into the ranks of the followers of Christ.

This pastor tells me that almost all of these bigamists still consider themselves Catholics. They attend Mass on Sunday, they make novenas and contribute to the Church and to charity. They feel that the only thing they are deprived of is the right to receive the Sacraments, but they console themselves with the thought that even this right will be accorded to them in danger of death (which would seem to be an excellent example of the sin of presumption). Many of these Catholics have obtained a civil divorce with no intention of attempting another union, but as time went on and they met

someone with whom they fell in love, they felt that life had treated them badly, and that they were entitled to some happiness even in this life, and that God would understand and be more merciful to them than the Church, and thus they have salved their consciences sufficiently to enter another union. In the minds of these people the Divine Law has been reduced to the force of a directive rubric, for they have rationalized themselves into the conviction that they are violating only a Church regulation. They are not married "according to the Church," they will tell you, "*but they are married.*" They would seem to be almost oblivious of the seriousness of their crime and its consequences to themselves and to their illegitimate offspring. They are aided in the development of this mentality by the respectability which has been accorded to them by the civil law, and by the general let-down in moral standards which has marked this first half of the twentieth century. It is evident that divorced people, who remarry, are no longer regarded by their neighbors, even by Catholics, as people of loose morals or undesirable friends.

This situation is giving rise to a thoroughly secularist mentality among many Catholics in this country relative to marriage. More and more American Catholics seem to be ignoring or spurning the authority of the Church with regard to marriage and adopting the perverted position that the State has sole and exclusive jurisdiction over the marriage of all of its citizens. I daresay, that innumerable Catholics now no longer regard the dissolution of the marriage bond by the civil authorities as a usurpation of the jurisdiction of the Church and a violation of the Divine Law, but rather complacently accept this as a right belonging to the State. To these Catholics, the jurisdiction of the Church is confined to "blessing" a marriage, and the Church has no authority over marriage other than to confer such a "blessing."

Hence the problem for us has a twofold aspect. In the first place, it is a problem *iuris publici*: viz. when Catholics seek and obtain a civil divorce, even if this is done only to safeguard their civil rights, they thereby acknowledge the authority of

the State to dissolve the bond of marriage, and their action in obtaining this civil divorce fosters in the minds of other Catholics the false impression, that the State has full authority over all the marriages of its citizens, and that the State has the right to dissolve the bond of marriage. Secondly, the problem is one *iuris privati* viz. Catholics who obtain a civil divorce, even if only with the intention of protecting the civil effects of the bond, place themselves in the proximate occasion of sin, for very many, if not most of them, as noted above, soon justify themselves and enter an adulterous union.

POSITION OF THE CHURCH

Against this background of modern infidelity to the sacred character and divinely decreed indissolubility of the marriage bond, the position of the Church has not moved one inch from what it has been for twenty centuries. This position is well known from the innumerable pronouncements of the Holy See and of the General Councils, and needs no reassertion here. However, it is well summed up by Pius XI, I think, when he states in his encyclical "*Casti connubii*":

> "And this inviolable stability, although not in the same perfect measure in every case, belongs to every true marriage, for the word of the Lord: 'What God hath joined together let no man put asunder,' must of necessity include all true marriages without exception, since it was spoken of the marriage of our first parents, the prototype of every future marriage. Therefore, although, before Christ, the sublimeness and the severity of the primeval law was so tempered, that Moses permitted to the chosen people of God on account of the hardness of their hearts, that a bill of divorce might be given in certain circumstances, nevertheless, Christ, by virtue of His supreme legislative power, recalled this concession of greater liberty and restored the primeval law in its integrity by those words which must never be forgotten, 'What God hath joined together let no man put asunder.' Wherefore, Our Predecessor Pius VI, of happy memory, writing to the Bishop of Agria, most wisely said: 'Hence it is clear that marriage even in the state of na-

ture, and certainly long before it was raised to the dignity of a sacrament, was divinely instituted in such a way that it should carry with it a perpetual and indissoluble bond which cannot therefore be dissolved by any civil law. Therefore although the sacramental element may be absent from a marriage, there must remain, and indeed there does remain, that perpetual bond which by divine right is so bound up with matrimony from its first institution that it is not subject to any civil power.'" [71]

Canon 1118, of the Code, states the matter as follows:

"Matrimonium validum ratum et consummatum nulla humana potestate nullaque causa, praeterquam morte, dissolvi potest."

It is evident, therefore, that, by Divine Law, a sacramental marriage (viz. the contract entered by two baptized persons) which has been consummated is absolutely indissoluble, and no power on earth may dare attempt the dissolution of such a bond. If it does, its action is utterly void and without effect in reality and before God. It is likewise evident that a non-sacramental, or a sacramental but unconsummated marriage, although *per se* indissoluble, is dissoluble by divine authority under certain conditions, and this by explicit exception in the Divine Law.[72]

COMPETENCE OF THE CHURCH AND STATE

The dissolution of these non-sacramental or unconsummated marriages however belongs solely and exclusively to the authority established by God as the Guardian and Interpreter of the Divine Law (viz. the Church), to which authority He has committed the exclusive care of the Sacraments and *res sacrae*.[73] The civil authority in every nation, therefore, has absolutely no competence to dissolve the bond of marriage existing between any man and woman, be they bap-

[71] Pius XI, encycl., "*Casti connubii*", 31 dec. 1930—*A.A.S.*, XXII (1930), 539-592.

[72] *Loc. cit.*

[73] Cf. Canons 1016 and 1960.

tized or unbaptized.[74] When the civil authority attempts to do this, it violates the law of God, it usurps the jurisdiction of the Church, and it performs a juridical action which is null and void in reality and before God. There can be no justification made of the action of the civil authority in this matter by making the specious distinction between the dissolution of the civil contract and civil bond, and the dissolution of the real contract and real bond, for as both Leo XIII and Pius XI have pointed out, there is no such thing as a civil contract or civil bond of marriage. There is only the natural contract and the natural bond, or the sacramental contract and the sacramental bond, and neither of these is subject to dissolution by the civil authority.[75] The Church of God alone, as the Guardian and Interpreter of the Divine Law, has exclusive jurisdiction over the natural contract which is a *res sacra,* and the sacramental contract which is a Sacrament.

THE LAW OF THE CHURCH

The *Code of Canon Law* takes no official cognizance of the usurpation of the authority of the Church by the civil government in the matter of civil divorce, and contains no direct and positive prohibition with regard to approaching the civil courts for the dissolution of the marriage bond. The Code confines itself to reasserting the sole and exclusive competence of the Church in the matter of the marriages of baptized persons in Canons 1016 and 1960, and to defining the competence of the State relative to the merely civil effects of the bond in Canons 1016 and 1961. These Canons we have already quoted above.

PARTICULAR LEGISLATION FOR THE UNITED STATES

The Third Plenary Council of Baltimore, however, has legislated directly on this point, and this legislation, since it is not opposed to the legislation of the Code but rather supple-

[74] Cf. Canons 1016 and 1961.

[75] Leo XIII, encycl. "*Arcanum*" 10 feb. 1880—*A.S.S.*, XII (1880), 385-402; Pius XI, encycl., "*Casti connubii*", 31 dec. 1930—*A.A.S.*, XXII (1930), 539-592.

ments it, still retains juridical force.[76] The American Council directly and positively prohibits Catholics from approaching the civil courts seeking the dissolution of the marriage bond, and inflicts a censure of excommunication, reserved to the Ordinary and incurred *ipso facto,* on those who attempt a bigamous union after obtaining a civil divorce. The words of the Council are as follows:

> ". . . . . .manifeste apparet gravissimae culpae illos esse reos, qui a magistratu civili matrimonium dissolvi postulant, vel, quod gravius est, divortio civili obtento, novum matrimonium inire attentant legitimo vinculo posthabito, quod coram Deo et Ecclesia adhuc manet. Ad haec crimina compescenda poenam excommunicationis statuimus, Ordinario reservatam, *ipso facto* incurrendam ab eis, qui postquam divortium civile obtinuerint, matrimonium ausi fuerint attentare." [77]

MAY A CATHOLIC SEEK A CIVIL DIVORCE

A. When His Marriage is Null or is Already Dissolved

The question now arises whether, in view of the position of the Church on this matter, and in view of the direct prohibition of the Third Council of Baltimore, it is ever licit for a Catholic to approach the civil courts seeking the dissolution of his marriage. It is *certain* that a Catholic is never permitted to approach the civil courts seeking the dissolution of his marriage without the permission of the Holy See or of the local Ordinary. But when may the local Ordinary grant this per-

[76] Barrett, *A Comparative Study of the Third Plenary Council of Baltimore and the Code,* The Catholic University of America Canon Law Studies, n. 83 (Washington, D. C., The Catholic University of America, 1932), p. 134.

[77] *Acta et Decreta Concilii Plenarii Baltimorensis Tertii,* n. 124. In addition to the sanction stated by the III Plenary Council for the United States, the universal law in Canon 2356 of the Code inflicts upon bigamists the vindictive penalty of *infamia iuris,* which is incurred *ipso facto.* The Canon continues that if such persons,, spurning the admonition of the Ordinary, persist in living in this illicit relation they are to be excommunicated or punished by the infliction of a personal interdict, according to the gravity of their crime. These latter penalties of course are *ferendae sententiae.* In the second section of the same Canon it states that persons who commit the public crime of adultery, are to be excluded from ecclesiastical acts until they show signs of true repentance.

mission to a Catholic? It is also certain that a local Ordinary may permit a Catholic to seek a civil divorce, *after* his marriage has been declared null by canonical process, or *after* the bond has been dissolved by the Holy See, or *after* the Ordinary has declared that the requirements of the Sacred Canons are present for the use of the Pauline Privilege, provided that the Ordinary in these cases makes it clear that he is permitting this merely to protect the property rights of the Catholic against a consort who is not really his spouse, (or who is no longer his spouse), or to assure civil recognition of any future marriage he may enter, or to avoid the danger of the Catholic being charged with bigamy under the civil law, if and when he enters another marriage which he now has the right to do.[78] If it is possible to obtain a civil annulment in such cases, this, it would seem, is to be preferred, for, although the State is also incompetent to annul the marriage of baptized persons, the granting of an annulment does not have the stigma of an attempted violation of the Divine Law on the part of the State which the granting of a civil divorce entails. This would seem therefore to be the lesser of the two evils, and to be preferred when it can be obtained.

B. When the Bond of a Valid Marriage Still Binds

But *when the bond of a valid marriage remains,* may the local Ordinary ever grant permission to a Catholic to seek a civil divorce? This question has been a burning issue since the time of the Protestant Reformation, and particularly since the time of the French Revolution, when the modern states began to usurp the authority of the Church on this matter.[79]

Particular Responses of the Holy See

Some of the older theologians and canonists held that the granting of a civil divorce was so evil in itself, and so devastating in its effects on the morals of the consorts, the families, and the states involved, that it was never licit for Cath-

[78] Gasparri, *De Matrimonio,* (ed. 1932), II, n. 1307; Noldin, *Summa Theologiae Moralis,* III, n. 672; Payen, *De Matrimonio,* III, n. 2514.

[79] Wernz-Vidal, *Ius Canonicum,* V, n. 707.

olics to approach the civil courts for a civil divorce.[80] Several of the Bishops of France and Belgium, at the latter part of the last century and during the early part of the present century, submitted cases to the Holy See requesting permission for Catholics to seek a civil divorce. In all these cases the Catholic petitioner had already been granted a permanent separation from his spouse because of the sole canonical reason for which such a separation is granted, namely, adultery. In all these cases, also, the Catholic petitioner had solemnly promised that he would never attempt another union while his true spouse still lived. In all these cases the reason given for seeking the permission was the protection of the civil rights of the Catholic. The first case was the case of a woman who sought a government position in order to earn her livelihood. The government of France at that time would not grant this position to the woman unless she were civilly divorced from her husband. The Sacred Penitentiary, on January 5th, 1887, replied:

> " Mulieri poenitenti, in casu, nihil aliud esse consulendum, nisi ut a petendo divortio sub gravi se abstineat."

Four years later, on January 14th, 1891, the Sacred Penitentiary refused to grant this permission to another woman who sought it " ad damna gravissima avertenda." Another woman, who sought permission to obtain a civil divorce in order that she might provide for the temporal and religious education of her orphaned granddaughter, was told by the Sacred Penitentiary, on June 3rd, 1891:

> " Petitam licentiam concedi non posse."

Later a Catholic man sought this permission in order to prevent his adulterous wife from obtaining a portion of his property. On January 30th, 1892, the Sacred Penitentiary replied:

> " Orator consulat probatos auctores." [81]

[80] Bucceroni, *Casus Conscientiae,* Vol. II (ed. 1900), 100; Gasparri, *De Matrimonio,* (ed. 1904), II, n. 1554.

[81] All these cases may be found in most of the authors who treat this matter (cf. Cappello, *De Sacramentis,* III, n. 835; Gasparri, *De Matrimonio,* [ed. 1932], II, nn. 1307-1325.).

Finally a case was presented to the Supreme Sacred Congregation of the Holy Office in which the question was asked whether a woman could be permitted to seek a civil divorce "ob gravissimas causas?" On August 6th, 1906, the Holy Office replied:

> "Attentis peculiaribus circumstantiis in casu concurrentibus, permitti posse, dummodo mulier oratrix coram Ordinario vel eius delegato ac duobus testibus, etiam iureiurando, declaret se matrimoniale vinculum nullatenus abrimpere, sed tantummodo a civilis ritus oneribus exsolvi velle; remoto scandalo quo meliori iudicio Episcopi fieri potest." [82]

General Conclusions from Responses of the Holy See

According to Gasparri, the Sacred Penitentiary has accepted this norm and has followed it since 1906.[83] I have been unable to find any more recent pronouncement of the Holy See on this matter, although I know of one particular case in 1945 in which the Holy Office replied in the selfsame words as quoted above in the response of August 6th, 1906.

Taking these private responses of the Holy See as a guide and reading them in the light of the doctrinal and juridical position of the Church, we may conclude:

> 1) That the granting and obtaining of a civil divorce is not, in itself, intrinsically evil, as some of the older canonists and theologians maintained, for, if it were, the Holy See would never have permitted it even in one case;
>
> 2) That, since the Holy See has refused permission for a Catholic to seek a civil divorce in every case which has been published save one, and since in that one case the circumstances and the motivating reason for the permission were not explained (except to state that they were most weighty), it would seem that we must proceed with the utmost caution in this matter, for seldom will we have any more deserving cases than those already refused this permission by the Holy See;

[82] Gasparri, *De Matrimonio*, (ed. 1932), II, n. 1324.

[83] *Loc. cit.*

3) That we must not be too much swayed by the fact that the Catholic may suffer material loss if denied this permission, for the denial by the Holy See in the cases mentioned above undoubtedly worked great hardship on the Catholics involved, and it must be remembered that it is sometimes necessary for a Catholic to suffer material loss in his private affairs in order to avoid doing greater harm to the public good.

These general conclusions being posited, let us now examine, in more detail, the question whether, and under what conditions, an Ordinary may permit a Catholic to seek a civil divorce while the bond of a valid marriage remains.

Opinions of Canonists and Theologians

Most modern authors, writing since the Holy Office granted that one permission in the particular case in 1906, have assumed that the policy of the Church has become less severe on this matter (an assumption which is hardly warranted, I would think, when based on only one private response in a particular case).[84] Many of these authors express rather lax opinions, and the treatment which almost all of them give to this subject is vague, confusing, and generally unsatisfactory.[85]

Many argue that since, in most countries, no other way can be found under the civil law to protect the property rights, and other civil effects flowing from the marriage bond, a Catholic must not be deprived of this protection and therefore should be given the permission to obtain a civil divorce even while the bond of a valid marriage remains. This argument in various forms is the principal reason offered by those who advocate granting permission to Catholics to seek a civil divorce.[86] In reply to this argument we must state, in the first place, that in this country it is not always true that the *sole* means of

[84] Gasparri, *De Matrimonio,* (ed. 1932), II, nn. 1324-1325; Cappello, *De Sacramentis,* III, nn. 837-838; Noldin, *Summa Theologiae Moralis,* III, nn. 672-676; Genicot-Salsmans, *Institutiones Theologiae Moralis,* II, nn. 561-562; Wernz-Vidal, *Ius Canonicum,* V, nn. 706-712; Payen, *De Matrimonio,* III, nn. 2503-2517.

[85] *Loc. cit.*

[86] *Loc. cit.*

protecting the civil rights of a Catholic is by obtaining a civil divorce, for sometimes the property rights of a Catholic can be safeguarded equally well by permitting him to obtain a separation *a mensa et toro manente vinculo* from the civil courts, after he has been granted an ecclesiastical decree of permanent separation.[87] At other times a private agreement or property settlement can be arranged between estranged spouses which, I am informed, is enforceable in civil law in every state. At other times the Catholic may so dispose of his property while still living that it will not fall into the hands of an unworthy consort at his death. Therefore it is not always true that the *sole* means of protecting the property rights of a Catholic is by permitting him to obtain a civil divorce. In the second place, not every separated spouse has a strict right in justice to the protection of the civil law for his property, but only he who is the innocent spouse of an adulterous consort, for only he has the right to break permanently "the communion of conjugal life" which is a mutual sharing in each other's possessions.[88] Thirdly, even when a Catholic has the right to the protection of the civil law over his property,

[87] In only two states (viz., Florida and West Virginia) the granting of a separation from bed and board *manente vinculo* by judicial decree is prohibited by law. But even in these two states an innocent wife, having an adulterous husband and living apart from him, may obtain financial support from him by judicial decree without seeking a civil divorce. In eleven other states (viz., Connecticut, Idaho, Illinois, Iowa, Mississippi, Missouri, Nevada, Oregon, Texas, Washington and Wyoming) there is no positive legislation with regard to separation from bed and board *manente vinculo* by judicial decree, although in four of these states (viz., Illinois, Iowa, Oregon and Wyoming) it is explicitly stated that a wife may sue for financial support without seeking a civil divorce. In seven other states (viz., Arizona, Colorado, Kansas, Minnesota, Ohio, Pennsylvania and South Dakota) a separation from bed and board *manente vinculo* by judicial decree may be obtained only by the wife. In the remaining twenty-eight states of the union (and in the District of Columbia) a separation from bed and board *manente vinculo* by judicial decree may be obtained by either party and for causes which generally correspond with the causes enumerated in Canons 1129 to 1131 of the Code (Cf. Alford, *Ius Civile Matrimoniale in Statibus Foederatis Americae Septentrionalis cum Iure Canonico Comparatum* (Romae: Anonima Libraria Cattolica Italiana, 1938), n. 453 & Appendix.

[88] Cf. Canon 1128.

and even when this protection can be obtained only by permitting him to seek a civil divorce, this reason is a good of its nature private, so that his private good must be weighed against the public good and the harm done to the public order by civil divorce. Viewed in this light, it would seem that this reason in itself cannot be considered as proportionate to the public evil of divorce, and therefore this reason alone would appear to be theologically insufficient to permit a Catholic to seek a civil divorce.[89] The argument, therefore, that a Catholic must not be deprived of the protection of the civil law over his property, is not as decisive and as compelling as many would have us believe, but it is rather only one aspect of a complex problem and to my mind not the most important aspect.

Others argue that every Catholic knows that the civil court cannot dissolve the bond of marriage, and that when a Catholic obtains a civil divorce, solely to protect the mere civil effects of the bond, he is doing nothing contrary to the law of the Church, since Canons 1016 and 1961 acknowledge the competence of the civil law over the mere civil effects of the bond. The granting and obtaining of a civil divorce, therefore, is an indifferent act. This argument, I think, is unrealistic and does not take into account the secularist mentality which is so general today, and the effect that the widespread granting of civil divorce is having on Catholics. I think that a consideration of the subsequent actions of many Catholics who have obtained a civil divorce, which we have described above, is the best answer to this argument, for, as we have noted above, very many, if not most of them, eventually enter an adulterous union. Furthermore, it can hardly be denied that the impression is growing stronger each day, even among Catholics, that the State has the right to dissolve the marriage bond, and the action of a Catholic in obtaining a civil divorce, even if only for its civil effects, fosters and strengthens this false impression. Moreover, this action fosters and strengthens the perverted notion that the State has sole and exclusive

[89] Gasparri, *De Matrimonio*, (ed. 1932), II, n. 1311; Genicot-Salsmans, *Institutiones Theologiae Moralis*, II, n. 562.

jurisdiction over the marriages of all of its citizens, and that the Church has authority merely to "bless" a marriage. The prevalence of this perverted idea, I think, can be judged by the number of Catholics who go through only a civil ceremony of marriage, and by the number of single Catholics who become involved with divorced non-Catholics[90] and eventually live with them in adulterous unions after only a civil ceremony. Such people insist that they are married, although their marriage is not "blessed." This secularist mentality with regard to marriage seems to be growing quite rapidly among American Catholics and the obtaining of a civil divorce by a Catholic, even if it is done only to safeguard his civil rights, confirms and corroborates this false and perverted concept. For these reasons I do not believe that the argument to the effect that Catholics know that the civil courts cannot dissolve the bond of marriage is realistic or valid, for it fails to take into account the evil effect the granting of a civil divorce has on the individual Catholic (who is then gravely tempted to commit public adultery) and it ignores the harmful effect the granting of a civil divorce has on other Catholics as noted above.

Others offer a similar argument to the effect that a civil divorce merely breaks the *civil* bond of marriage and its consequent civil effects, but does not break the *real* bond as every Catholic knows.[91] In reply we need only point to the teaching of both Leo XIII and Pius XI to the effect that there is no such thing as a *civil* contract or *civil* bond of marriage. There is only the natural contract and the natural bond, or the sacramental contract and the sacramental bond, both of which are *per se* indissoluble by divine law, and neither of which is subject to dissolution by the civil authority.[92]

[90] The Supreme Court of the United States, in the case of *Williams* v. *North Carolina*, (May 21, 1945), in its decision estimates that there are approximately 5,000,000 divorced persons now living in the United States (Cf. *Catholic Action*, November, 1945, p. 11).

[91] Ballerini-Palmieri, *Opus Morale Theologicum*, VI, nn. 521-524.

[92] Leo XIII, encycl. "*Arcanum*", 10 feb. 1880—*A.S.S.*, XII (1880), 385-402; Pius XI, encycl. "*Casti connubii*", 31 dec. 1930—*A.A.S.*, XXII (1930), 539-592.

Other more pragmatic arguments are offered by those who advocate freely allowing Catholics to seek a civil divorce. One is that the Holy See knows that many Catholics are obtaining civil divorces and has made no direct prohibition and has issued no general decree on the matter, thereby tolerating the situation.[93] By such reasoning, I think, almost any abuse, and practically every crime, could be justified. Another pragmatic argument for this position is that the Church in this country places itself in danger of being sued in the civil courts for alienation of affection, or for interference in the business of the State, if it insists upon passing judgment on the validity of a marriage, or dissolving the natural or unconsummated bond, before the State has issued a civil divorce. I do not think it is necessary to answer this cowardly plea to abandon the juridical position of the Church merely because there is danger of conflict with a civil law. However, I might state that I think the danger of such a contest, in a practical case, is extremely remote.

Finally, most practical canonists in this country seem to take the position, that the matter is doubtful, and, inasmuch as there is no definite prohibition by the Holy See, a Bishop in this country may dispense from the law of the Third Plenary Council of Baltimore and permit a Catholic to seek a civil divorce to protect his property rights, even while the bond of a valid marriage still exists.

Opinion of the Author

I cannot say that I agree with this position. To my mind the matter is not doubtful. The juridical position of the Church is clear, viz. that the civil authority is utterly and absolutely incompetent to dissolve the bond of marriage existing between any man and woman, whether baptized or unbaptized, and when it attempts to do so, it violates the law of God, usurps the jurisdiction of the Church, and its action is

[93] Cappello, *De Sacramentis*, III, n. 837; Wernz-Vidal, *Ius Canonicum*, V, n. 712; Noldin, *Summa Theologiae Moralis*, III, n. 673; Gasparri, *De Matrimonio*, (ed. 1932), II, n. 1325.

juridically null and void. To permit a Catholic to seek a civil divorce, even if only to protect his property rights, forces Catholics to acknowledge the right of the State to dissolve the marriage bond and gives rise to a growing secularism among Catholics relative to marriage, and places these civilly divorced Catholics in the proximate occasion of sin. The results of following this policy of indecision and confused thinking are evident in the appalling conditions existing in our country today, and unless a definite and unified stand is taken on this matter with regard to Catholics, these conditions will undoubtedly grow worse, and many more souls will be lost to Christ and to His Church. Therefore, I conclude with certainty that a Catholic may *not* be granted permission to seek a civil divorce, even if only for the protection of his property rights, at least until the following conditions are verified:

1) The Catholic can obtain the protection of the civil law for his property in no other way.

2) The Catholic has an indubitable right in justice to the protection of the civil law for his property. This right to the protection of the civil law can only be considered indubitable after he has obtained an ecclesiastical decree of permanent separation from his adulterous spouse, for only then can he be considered to have a " just cause " for permanently severing the " communion of conjugal life " which is the mutual sharing in each other's possessions. If only a temporary ecclesiastical separation, even for an indefinite period, has been decreed, the obligation remains to resume cohabitation and common life as soon as the cause ceases because of which a temporary separation was granted. To permit a Catholic to seek a civil divorce in these circumstances would be unjust to the other consort for this would be denying permanently to the other spouse his right to share in their community of goods, whereas the reason present justifies only a temporary denial. Moreover, as practical experience proves, a civil divorce would create a serious obstacle to the resumption of common life after the cause had ceased for which the temporary separation was granted. The granting of a permanent ecclesiastical separation would seem to be a conditio sine qua non to the granting of permission to seek a civil divorce for another reason also, for only

by doing so can we maintain, in a practical case, the right of the Church to sole and exclusive jurisdiction over the marriage bond of baptized persons, and bring out the reality of the assertion that the civil divorce is sought only to protect the merely civil effects of the contract. Therefore, it seems clear that a Catholic has not the right to the protection of the civil law for his property and may not seek a civil divorce unless he has received an ecclesiastical decree of permanent separation.

3) There must be present a cause which is proportionate to the evil before a Catholic may be permitted to obtain a civil divorce, even if only to protect his civil rights. Since the evil of civil divorce is an evil of the public order, as well as private, the cause must be one of the public or supernatural order, if it is to be considered as proportionate to the evil. Therefore, it would seem that the protection of the property rights of a Catholic, in itself, is not sufficient cause to permit him to seek a civil divorce.

4) The Catholic must declare, under oath and before the Ordinary or his delegate and two witnesses, that he does not recognize the authority of the State to dissolve the bond of marriage, and that he is seeking this civil divorce merely for the civil effects which will follow and to which he has a right. Only thus can the sole and exclusive competence of the Church over the bond of marriage of baptized persons be upheld before this Catholic, and before Catholics in general.

5) The Catholic must solemnly promise that he will not attempt another union during the lifetime of his true spouse, and that he will do his utmost to preserve perfect chastity. Only thus can the serious character of this obligation be impressed upon him, and only thus, it would seem, can he be made aware of the proximate danger of incontinence which the obtaining of a civil divorce brings upon him.

6) No scandal will rise from the granting of permission to this Catholic to seek a civil divorce, in view of all of the circumstances of the case.[94]

[94] It would seem that the probability or even the certainty that his consort will attempt an adulterous and bigamous union, after a Catholic obtains a civil divorce, need not be taken into consideration, in determining whether or not to permit a Catholic to obtain a civil divorce, because all authors rightly maintain that an innocent spouse is not responsible for the future sins of a consort

It seems certain that only after all six of these conditions have been verified, in a particular case, may an Ordinary even consider granting permission to a Catholic to seek a civil divorce. But after these conditions are verified it might still be doubted that an Ordinary may grant permission to a Catholic to seek a civil divorce, for, although *de iure,* as the guardian of the public and private morals of those committed to his care, he would seem to have the right to grant this permission by virtue of his office, yet, *de facto,* he would hardly ever be presented with a case more deserving of the permission to seek a civil divorce for its civil effects than has already been refused by the Holy See, as noted above. Therefore, it would seem to be more prudent for the Ordinary, even when the conditions mentioned above have been verified in a particular case, to refer the matter to the Holy See, especially since, in the one published case allowed by the Holy See, the circumstances of the case and the reasons for granting the permission were not made known, so that we are without criteria for judging what the Holy See regards as "most weighty circumstances and reasons."

If these conclusions appear to be too severe, at least it must be admitted that they seem to be demanded by the laws of logic as well as the rules of moral theology and canonical jurisprudence. If they will work a hardship in the case of many Catholics who have unworthy consorts, perhaps that is the price which must be paid to protect the divinely decreed indissolubility of Christian Marriage. If this appears to be a "hard saying," it must be remembered that the reward

who is dismissed for the crime of adultery. So also it would seem that a Catholic, who has been permanently separated from his spouse by ecclesiastical decree because of the crime of adultery, and in whose case the other conditions mentioned above are verified, would not be responsible for the future sin of his guilty consort even if the Catholic foresees that after he obtains a civil divorce his spouse will attempt another union. Cf. Cappello, *De Sacramentis,* III, n. 827; Gasparri, *De Matrimonio,* (ed. 1932), II, n. 1174; Genicot-Salsmans, *Institutiones Theologiae Moralis,* II, n. 556; Noldin, *Summa Theologiae Moralis,* III, n. 670; Lehmkuhl, *Theologia Moralis,* II, n. 712; St. Alphonsus, *Theologia Moralis,* Lib. VI, n. 969.

promised to those willing to pay the price, is an eternity of happiness.

The key to the control of the divorce evil among Catholics, therefore would seem to be the enforcement of the strict discipline of the Holy See with regard to the separation of consorts. If Catholics were made to realize that they were not permitted even to separate on their own authority (except in the rare cases mentioned in the law), and if Catholics were made to realize that they could not approach the civil courts even to seek a decree of separation until after the Church had granted a decree of separation for a just cause, the number of Catholics seeking a civil divorce would be greatly reduced. Of course this presupposes that the necessary canonical machinery in the Episcopal Curia has been set up for the handling of separation problems.

OBLIGATIONS OF CATHOLICS BASED ON STATUS

A. Obligation of Catholic Consorts

It is evident, therefore, that Catholics may not approach the civil courts seeking a civil divorce while the bond of a valid marriage still binds them (even if they wish to do this solely for the purpose of obtaining the protection of the civil law for their property rights) without the permission of the Holy See, or, at least, of the local Ordinary. It seems certain also that this permission cannot be granted to them unless the six conditions, noted above, have been verified.

B. Obligation of Catholic Lawyers

As noted above, the lawyer is juridically the same person as his client, so that if it is lawful for the client to seek a civil divorce it is lawful for the attorney to act in his behalf.

When it is not lawful for the client to seek the divorce, the Catholic lawyer may cooperate with him only under the same conditions as mentioned above, viz.:

1) His cooperation must not be formal but only material cooperation; i. e., he must not approve of the evil action of his

client, and he must do everything possible to dissuade him from instituting this action; failing in this, he must explain to him that the civil divorce does not really dissolve the bond of marriage which exists between him and his consort.

2) A most grave reason must exist which is proportionate to the evil of divorce. As explained above, this must be a reason of the public or supernatural order to be proportionate to this great public evil.[95]

In the light of these principles it would seem that only in a most rare instance, as one modern theologian states, would a Catholic lawyer be justified in representing a client who is illicitly seeking a civil divorce.[96] Catholic lawyers therefore must refrain from this practice generally for, as Leo XIII states, " It is not lawful to follow one line of conduct in private and another in public, respecting privately the authority of the Church but publicly rejecting it." [97]

C. Obligation of Catholic Judges

It is evident that a Catholic judge of the civil court, even though incompetent to do so, may grant a civil divorce to one whose marriage is null, or whose marriage has been dissolved by the Holy See, or whose marriage can be dissolved by the use of the Pauline Privilege, for, in these cases, he is not attempting to break the bond of marriage or participating in a violation of the Divine Law.[98] But if the plaintiff seeking the

[95] Gasparri, *De Matrimonio*, (ed. 1932), II, nn. 1310-1311; Genicot-Salsmans, *Institutiones Theologiae Moralis*, II, n. 562. It must be noted that these conditions apply even when the client is not a Catholic, as long as he is validly married, for the State is incompetent to dissolve the bond of any valid marriage.

[96] Genicot-Salsmans, *loc. cit.* It must be noted, however, that the Holy See has declared that " it can be tolerated " that a Catholic lawyer act in behalf of the defendant in a civil divorce action when the defendant is opposing the petition for the civil divorce (Cf. S. C. Holy Office, May 22, 1860, quoted by Gasparri, *De Matrimonio*, II [ed. 1932], n. 1312).

[97] Leo XIII, encycl. *"Immortale Dei"*, 1 nov. 1885—*A.S.S.*, XVIII (1886), 161-180.

[98] Gasparri, *De Matrimonio*, (ed. 1932), II, nn. 1310-1311; Genicot-Salsmans, *Institutiones Theologiae Moralis*, II, n. 562; Noldin, *Summa Theologiae Moralis*, III, n. 673.

civil divorce is validly married, a Catholic judge of the civil court may cooperate in this evil action only on the two conditions mentioned above, viz.:

1) His cooperation is not formal but only material cooperation, i. e., he does not approve of the evil action of the plaintiff, and he does everything possible to dissuade him from instituting this action; failing in this, he must explain to him that the decree of the civil court does not really dissolve the bond of marriage but merely frees him from the civil effects of the contract. From the decrees of the Holy See on the question of permitting a Catholic judge to act in such cases, it would seem that the Holy See would oblige the judge thus openly to profess his faith in each individual case.[99]

2) A most grave reason exists which is proportionate to the evil of divorce. As noted above, this must be a reason of the public or supernatural order. As also noted above, in the case of Catholic judges of the civil courts, this proportionately grave reason is almost always present, for, if all Catholic judges were forced to resign their posts or were unable to accept judicial office, a grave and public harm would be done to both the Church and State.[100]

D. Obligation of Catholic Priests

The first obligation of Catholic priests in this matter would seem to be to present a united front so that all priests everywhere will give the same information to Catholics everywhere, viz., that they may not seek a civil divorce without the explicit permission of the Holy See, or at least of the local Ordinary, and that, if they do so, even if only for the civil effects and without any intention of attempting an adulterous union, they commit a grave sin. This is explicitly stated in the

[99] Gasparri, *De Matrimonio*, (ed. 1932), II, nn. 1310-1311; Cappello, *De Sacramentis*, III, n. 836.

[100] Gasparri, *loc. cit.;* Noldin, *Summa Theologiae Moralis*, III, n. 673; Genicot-Salsmans, *Institutiones Theologiae Moralis*, II, n. 562. It must also be noted here that these conditions must be verified even when the parties seeking a civil divorce are not Catholics, as long as they are validly married, for the State is incompetent to dissolve any valid marriage.

Decrees of the Third Plenary Council of Baltimore and is therefore the law for this country.[101]

The second obligation would seem to be to instruct Catholic lawyers and judges of the civil courts on their obligations in this matter.

The third obligation would seem to be to work for the revision of civil legislation in their own community, so that the civil legislation in the various states will be brought more and more into conformity with the law of the Church.

DIFFICULTIES ARISING FROM CIVIL LEGISLATION

It is obviously impossible to examine into all of the difficulties which may arise due to the varying legislation of the forty-eight states on marriage and divorce. It is equally impossible to attempt to offer a solution of the many practical problems which may present themselves. However, I would like to conclude this paper with the proposal that we work toward the accomplishment of two objectives relative to the civil law.

The first is to seek to have the legislature of each state recognize and attach the same juridical effects to a separation *a mensa et toro manente vinculo* as are attached to the decree of civil divorce (*mutatis mutandis*). Thus Catholics who have been permanently separated by ecclesiastical decree would be enabled to obtain the same protection for their civil and property rights by obtaining a civil decree of separation *a mensa et toro manente vinculo* as they would if they had obtained a decree of civil divorce.

Secondly, I would suggest that the legislature of each state be urged to recognize adultery as a cause for separation *a mensa et toro manente vinculo,* so that a Catholic, after obtaining an ecclesiastical decree of permanent separation for this crime, may be permitted to obtain a civil decree of separation *for this same cause* to protect his civil and property

[101] *Acta et Decreta Concilii Plenarii Baltimorensis Tertii,* n. 124; Barrett, *A Comparative Study of the Third Plenary Council of Baltimore and the Code,* p. 134.

rights. I understand that in some states adultery is not a cause for separation but only for divorce.[102] This situation enables

[102] In the following states separation from bed and board may not be obtained explicitly for adultery, although such a separation may be obtained for other less serious causes (adultery may be used, e.g., as a source of mental cruelty):

Maine	
Maryland	
Michigan	
Minnesota	(only in favor of the wife)
Nebraska	
New York	
North Carolina	
Tennessee	
Utah	
Virginia	
Wisconsin	

In the following states separation from bed and board may be obtained by judicial decree explicitly because of adultery:

Alabama	
Arizona	(only in favor of the wife)
Arkansas	
California	
Colorado	(only in favor of the wife)
Delaware	
Georgia	
Indiana	
Iowa	(no causes for separation *a mensa et toro manente vinculo* are stated in the law but it would seem certain that such a separation could be obtained because of adultery)
Kansas	(only in favor of the wife)
Kentucky	(All the causes for separation *a mensa et toro manente vinculo* are left to the discretion of the courts. It would seem certain, therefore, that such a separation would be granted because of adultery)
Louisiana	
Massachusetts	(Separation *a mensa et toro manente vinculo* may be granted to either a husband or a wife who, *having a just cause* [it would seem that adultery would be a just cause] is living separately from his or her consort)
Montana	
New Hampshire	

an adulterous and malicious consort, after his Catholic spouse has been legitimately and permanently separated because of

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New Jersey	
New Mexico	
North Dakota	
Ohio	(only in favor of the wife)
Oklahoma	
Pennsylvania	(only in favor of the wife)
Rhode Island	
South Carolina	
South Dakota	(All causes for separation *a mensa et toro manente vinculo* are left to the discretion of the Court. It would seem certain, therefore, that such a separation could be obtained at least by the wife because of the adultery of her husband)
Vermont	
District of Columbia	

The legislation in the remaining states on this point summarily is as follows:

A. Connecticut Idaho Illinois Mississippi Missouri Nevada Oregon Texas Washington Wyoming	No legislation regarding separation *a mensa et toro manente vinculo*
B. Florida	Separation *a mensa et toro manente vinculo* cannot be granted by judicial decree, but a wife, who is *not* adulterous and living apart from her husband and having ground for a civil divorce from him (viz., adultery of husband), may obtain alimony without seeking a divorce.
C. West Virginia	Since 1935 separation *a mensa et toro manente vinculo* has been abolished in the law, but a wife, having an adulterous husband and living apart from him, may bring an action for separate maintenance.

(Cf. Alford, *Jus Civile Matrimoniale in Statibus Foederatis Americae Septentrionalis cum Jure Canonico Camparatum.* Appendix).

his adultery, and has obtained a civil decree of separation *a mensa et toro manente vinculo* on a less serious ground than adultery, (e.g. mental cruelty), to move to another state, and, having established a domicile there, obtain a civil divorce (e.g. on the basis of desertion), thus voiding any property settlement or financial support to which he was obliged under the civil decree of separation obtained by his spouse. It is principally for this reason, I am informed, that civil lawyers advise Catholic clients to seek a civil divorce rather than a civil separation from bed and board. But if a Catholic could obtain a civil separation decree explicitly for adultery, then it would seem that no other court in another state would dare to grant a civil divorce on any less serious charge, and the original civil decree of separation would retain its force.

If both of these proposals were accomplished most of the difficulties, arising from civil legislation, which now are alleged as reasons for permitting Catholics to obtain a civil divorce, would be eliminated, and there would be no reason for a Catholic to seek a civil divorce, except a sinful intention to attempt an adulterous and bigamous union. Thus Catholics would condemn themselves in the eyes of their fellow Catholics by obtaining a civil divorce, for all would know that they intended to become public adulterers. Thus, too, Catholics who were legitimately and permanently separated from their consorts by ecclesiastical decree, could obtain the protection of the civil law for their property rights by being given permission to obtain a civil decree of separation from bed and board, *manente vinculo,* for its civil effects. Thus, too, Catholics would no longer be forced to recognize the usurped authority of the State over the bond of Christian Marriage, and no longer be forced to cooperate with the State in its attempted violation of the Divine Law. This would strike a deathblow, I think, at the growing secularist mentality relative to marriage among Catholics, and effectively vindicate the asserted sole and exclusive authority of the Church over the bond of Christian Marriage. Finally separated Catholics could no longer regard

themselves as even civilly free to attempt another union and thus the temptation to attempt another union would be considerably weakened. Thus perhaps the number of Catholics being lost to the Church and to Christ through this plague of civil divorce would be substantially reduced and we would be taking the first steps toward the extirpation of this disease which is devastating the family, demolishing the home, undermining the moral stability of our country and destroying immortal souls.

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DIVORCE BY PROXY.

"The State recognizes the family as the foundation stone of social order and has an interest in the marital status, its continuance and its dissolution. . . . . The contract of marriage cannot be dissolved upon the whim or caprice, or by the consent or collusion, of the contracting parties. . . . . Only for the grave causes recognized and sanctioned by law, can the marriage be dissolved. The parties to such an action have not the right to control procedure as in other civil actions. . . . . The weight of authority would seem to be that a suit for divorce must be regarded as one which is so strictly personal that it cannot be maintained at the pleasure of a guardian or committee of an alleged insane spouse. It was the privilege of the wife, as the allegedly aggrieved party, to decline to seek a divorce, and regardless of the motives behind her attitude it was not within the province of her counsel, her guardian or the court to force a divorce upon her." These words were spoken by a court in Los Angeles reversing a Superior Court judgment which had granted a woman a divorce, not wanted by her, but sought in a cross-complaint to a divorce action filed by her husband. The court granting the divorce denied her request to be permitted to withdraw the cross-complaint, which had actually been filed for her by her attorney, who had obtained appointment as her guardian for the purposes of the suit on the basis of her incompetence.

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